[ORAL ARGUMENT NOT YET SCHEDULED]

No. 07-5247

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEONARD MALEWICZ et al.,

Plaintiffs-Appellees,

v.

CITY OF AMSTERDAM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. Rule 28(a)(1), the United States submits the following certifications:

A. Parties and Amici.

The parties in the district court and this Court are as follows: Plaintiffs-Appellees are: Leonard Malewicz, Susanna Malewicz, Waldemar Malewicz, Jan Malewicz, Jozef Malewicz, Stanislaw Malewicz, Andrezj Malewicz, Aleksander Malewicz, Grazyna Kusmierz, Grazyna Sobieraj, Galina Greshnyakova, Evgeny Bykov, Alexander Bykov, Sofia Malitzkaya, Olga Asadova, Yevgeny Malitzky, Nikolai Uriman, Mkhail Uriman, Yury Zaitzev, Olga Barkova, Alexander Bogdanov, Sanislav Bogdanov, Igor Bogdanov, Lubov Filonova, Romualda Zorniak, Iwona Dluzniewska, Stephen Sage, George Sage, Irene Sage, Michael Sage, Lena Yost, Anne Toman, Julia Sage, Katherine Hayes and Gloria Sage.

Defendant-Appellant is the City of Amsterdam, a political subdivision of the Kingdom of The Netherlands.

The United States, appearing as amicus curiae herein, filed a Statement of Interest and a Supplemental Statement of Interest in the district court.

The Association of Art Museum Directors and a number of Individual Art Museums jointly filed a brief as amicus curiae on January 28, 2008.

The American Jewish Committee, American Jewish Congress, the Commission for Art Recovery, the Jewish Community of Vienna, the Lawyers Committee for Cultural Heritage Preservation, David J.

Bederman, Michael Berenbaum, Judy Chicago, Donald Woodman, Hedy Epstein, Richard A. Falk, Hector Feliciano, Douglas Kinsey, Marjorie Kinsey, Franklin Littell, Marcia Littell, Herbert Locke, Jonathan Petropolous, Brendan Pittaway, Carol Rittner, John Roth, and Elie Wiesel jointly filed a motion for leave to participate as amicus curiae, which was granted by this Court on December 14, 2007.

B. Rulings Under Review.

The rulings under review are the Memorandum Opinion and Order entered on March 30, 2005 by Judge Rosemary M. Collyer of the United States District Court for the District of Columbia, 362 F. Supp. 2d 298 (D.D.C. 2005); and the Memorandum Opinion and Order entered on June 27, 2007 by Judge Collyer, 517 F. Supp. 2d 322 (D.D.C. June 27, 2007).

C. Related Cases.

This case was previously before this Court as Malewicz v. City of Amsterdam, No. 05-5145 (D.C. Cir.), an appeal of Judge Collyer's March 30, 2005 Memorandum Opinion and Order. This Court dismissed that previous appeal for lack of appellate jurisdiction on January 10, 2006. We are aware of no related cases currently pending in this Court or any other Court.

Dana J. Martin

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GLOSSARY

"App."	Appendix
"FSIA"	Foreign Sovereign Immunities Act

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INTRODUCTION AND INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States files this brief as amicus curiae in support of defendant-appellant.

This case contests the ownership of artwork that was temporarily loaned to museums in the United States by the City of Amsterdam under immunity protection afforded by the Executive Branch pursuant to 22 U.S.C. § 2459. The Department of State's determination that the artwork in question was culturally significant and its exhibition was in the national interest insulated the imported artwork from judicial process under § 2459, a statute enacted in 1965 to promote cultural exchanges with other nations and to encourage exhibitions that would not otherwise be available to the American public.

The United States has a strong interest in facilitating cultural exchanges with other nations. In achieving that goal, the Executive Branch has often exercised its authority under 22

U.S.C. § 2459 to determine that temporary loans from abroad are of cultural significance and in the national interest. Since the statute's enactment, such determinations have provided foreign lenders with the assurance that such loans may not serve as the basis for the jurisdiction of United States courts. Since 2000, the State Department has published in the Federal Register determinations for more than 650 temporary exhibits.

The district court held that the presence of a temporary art exhibit protected under 22 U.S.C. § 2459 can serve as the basis for jurisdiction under the "takings" exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3). For the reasons set out below, the district court's ruling misconstrues the scope and language of the "takings" exception in a manner that substantially undermines the purposes of 22 U.S.C. § 2459. It is the view of the Executive Branch that this ruling, if affirmed, will discourage foreign states and other lenders from providing their artwork for temporary exhibit in the United States, and will significantly impair the ability of the United States to facilitate cultural exchanges as instruments of foreign policy.

STATEMENT

A. Statutory Background.

1. Immunity of Loaned Artwork from Judicial Process.

Congress enacted 22 U.S.C. § 2459(a) in 1965 to permit foreign entities to lend works of cultural significance without fear that the loan of the artwork would subject them to the jurisdiction of United States courts. The statute creates a

mechanism by which the President or his designee (currently the Department of State)[1] may determine that the objects to be imported are of "cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest." Id. The statute is applicable only when there is an agreement between the foreign owner or custodian and a U.S. cultural or educational institution "providing for the temporary exhibition or display" of the artwork "at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution."

If the Department of State determines that the requirements of § 2459 have been met and publishes its cultural significance and national interest determinations before the objects are imported, § 2459 precludes any United States court from "issu[ing] or enforc[ing] any judicial process, or enter[ing] any judgment, decree, or order, for the purpose or having the effect of" depriving the borrowing institution of "custody or control of such" artwork. Id.

2. Immunity of Foreign Sovereigns.

The Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) ("FSIA"), codified at 28 U.S.C.

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[1] The Department of State administered 22 U.S.C. § 2459 until 1978, when these responsibilities were redelegated to the International Communication Agency, which was subsequently redesignated as the United States Information Agency. In 1999, the Department of State resumed responsibility for administering § 2459 when it was consolidated with the United States Information Agency pursuant to the Foreign Affairs Reform and Restructuring Act of 1998. See 22 U.S.C. § 6501 et seq.

§§ 1330, 1602, et seq., sets forth a general rule that foreign states are immune from suit in American courts. 28 U.S.C. § 1604. Courts may exercise jurisdiction over foreign states only if the suit comes within one of the specific exceptions to that rule established by Congress. See id. §§ 1605-07. The exception set forth in 28 U.S.C. § 1605(a)(3) (known as the "takings" or "expropriation" exception), provides that a foreign state or its political subdivision is not immune from suit in a case:

> in which rights in property taken in violation of international law are in issue and that property * * * is present in the United States in connection with a commercial activity carried on in the United States by the foreign state.

28 U.S.C. § 1605(a)(3).

"[C]ommercial activity carried on in the United States by a foreign state" is itself a defined term and means "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e).

The FSIA for the first time established a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 488 (1983). From The Schooner Exchange v. M'Fadden, 11 U.S. (7 Cranch) 116 (1812), until 1952, the United States had adhered to the "absolute theory of sovereign immunity," pursuant to which "a sovereign cannot, without his

consent, be made a respondent in the courts of another sovereign." Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976) (reprinting "Tate letter"). See also Verlinden, 461 U.S. at 486. The absolute theory was displaced by the "restrictive theory" of foreign sovereign immunity in 1952, when the State Department endorsed that approach in the "Tate Letter." Under the restrictive theory, foreign sovereign immunity "is confined to suits involving the foreign sovereign's public acts and does not extend to cases arising out of a foreign state's strictly commercial acts." Verlinden, 461 U.S. at 487. The State Department's adoption of the restrictive theory reflected an increasing acceptance of that theory by foreign states, and the need for a judicial forum to resolve disputes stemming from the "widespread and increasing practice on the part of governments of engaging in commercial activities." Alfred Dunhill, 425 U.S. at 714.

The FSIA codified foreign sovereign immunity principles "in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that * * * decisions are made on purely legal grounds and under procedures that insure due process.'" Verlinden, 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7 (1976)).

B. Factual Background.

Plaintiffs are 35 living heirs of Russian artist Kazimir Malevich, who put many of his artworks in the custody of others when he left Germany in 1927 and returned to the Soviet Union.

Plaintiffs allege that Kazimir Malevich brought more than 100 artworks to Berlin in 1927, many for exhibition. Appendix ("App.") 41 (Am. Compl. ¶ 8). When he was required to return to the Soviet Union, Malevich entrusted the works to several German friends, including Alexander Dorner and Hugo Häring. App. 41(Am. Compl. ¶ 8). When the exhibition of Malevich's work closed in September 1927, his works were packed and several years later shipped to Dorner. App. 41-42 (Am. Compl. ¶¶ 9-10). Malevich died in Russia in 1935. App. 42 (Am. Compl. ¶ 13). Dorner fled to the United States in 1937. App. 42 (Am. Compl. ¶ 11). Before he left Germany, Dorner sent most of the artwork to Häring, who still resided in Germany. App. 42-43 (Am. Compl. ¶ 13).

The City of Amsterdam entered into a loan contract with Häring in November 1956 that contained an option to purchase the Malevich Collection. App. 50 (Am. Compl. ¶ 35). In 1958, the City exercised its option. Ibid.

The plaintiffs allege that Dorner and Häring lacked sufficient rights to Malevich's paintings to transfer ownership of them, and that the City knew of their lack of authority and conspired to fabricate documents supporting the City's claim to ownership. App. 43-51 (Am. Compl. ¶¶ 14-40). After the fall of the Iron Curtain, Malevich's living heirs contacted Amsterdam and began negotiations for the return of the collection. They were unable to reach an agreement. App. 52 (Am. Compl. ¶¶ 42-43).

Fourteen of the 84 pieces in the Malevich Collection were exported to the United States in 2003 to be part of a temporary exhibition of artwork at the Guggenheim Museum in New York City

and the Menil Collection in Houston. App. 40-41 (Am. Compl. ¶ 6). These exhibitions were arranged under the terms of the Mutual Educational and Cultural Exchange Program administered by the State Department.

Following a request by Amsterdam that the artwork be granted immunity from legal process while in this country, and an objection filed by counsel for the Malewicz heirs, the State Department determined that the objects were of cultural significance and that their temporary exhibition was in the national interest. The State Department therefore published a notice of immunity from judicial process for the 14 Malevich pieces pursuant to 22 U.S.C. § 2459. See 68 Fed. Reg. 17,852 (April 11, 2003), App. 307-08.

C. Prior Proceedings.

1. The Malewicz Heirs filed this action two days before the closure of the exhibit of the Malevich works at the Menil Collection in Houston. The artwork was returned to Amsterdam in as scheduled, and before Amsterdam was served with notice of this suit. See App. 303 ¶ 11, 853.

Plaintiffs alleged that the artworks were taken in violation of international law, asserting jurisdiction under the FSIA's takings exception, 28 U.S.C. § 1605(a)(3), on the theory that the 14 artworks were "present in the United States" when the complaint was filed. Asserting claims of replevin, rescission, conversion, violation of international law, and unjust enrichment, the Heirs seek an order directing the return of the 14 paintings in possession of the City of Amsterdam, rescission

of the purported sale of those works to the City, damages for conversion and violation of international law, and imposition of a constructive trust. App. 75-77 (Am. Compl. ¶¶ 45-57 & Prayer for Relief ¶¶ 1-8).

The City of Amsterdam moved to dismiss for lack of jurisdiction under the FSIA. The City also raised a statute of limitations defense, and invoked the Act of State doctrine and the forum non conveniens doctrine. The United States filed a statement of interest and supplemental statement of interest in district court, noting its concern that allowing jurisdiction based on the presence of the artwork would seriously undermine the interests that § 2459 was designed to foster and threatened to create friction in relationships between the United States and other nations. App. 659-66, 775-82.

2. In a March 30, 2005 opinion (App. 121-49), the district court declined to dismiss the claims for lack of jurisdiction and ordered further factual development on the nature of the City's contacts with the United States.

The court held that the disputed artworks were "present in the United States" within the meaning of the FSIA's expropriation exception even though the artworks were immunized from judicial process under 22 U.S.C. § 2459. App. 140-41. Although it recognized the policy concerns created by its ruling, the court concluded that its ruling was mandated by the plain texts of § 2459 and § 1605(a)(3). Ibid. The court found the statutory provisions "both clear and not inconsistent," stating that they "are unrelated except that a cultural exchange might provide the

basis for contested property to be present in the United States and susceptible, in the right fact pattern, to a FSIA suit." App. 140. The court reasoned that § 2459 protected only against judicial seizure, which did not extend to "immunity from suit for a declaration of rights arising from an alleged conversion." App. 141.

3. After reviewing additional evidence submitted by the parties, the district court held in a June 27, 2007 opinion (App. 150-76) that the City had engaged in commercial activity in the United States within the meaning of § 1605(a)(3) of the FSIA. The court emphasized that the City contracted with the American museums knowing that the paintings would be displayed here and that the heirs disputed the City's rightful ownership of them. App. 162. It noted that the City received nearly 25,000 euros as consideration for the contract, and sent employees to the United States to oversee the safety of the artwork; those employees collectively spent 34 days in the United States. App. 162-63.[2]

SUMMARY OF ARGUMENT

Congress enacted 22 U.S.C. § 2459 to encourage temporary loans by foreign lenders of objects of "cultural significance" when exhibiting them in the United States is determined by the Executive Branch to be "in the national interest." The statute sought to ensure that exhibits provided immunity protection by the State Department would not form the basis of suit, and the statute has achieved that goal since its enactment in 1965.

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[2] The court also declined to dismiss under the "Act of State" doctrine. App. 170-75.

When Congress enacted § 2459, attachment of property was generally required to effect process on foreign states, and the district court recognized that, under § 2459, immunized artwork could not be the basis for in rem or quasi in rem jurisdiction to adjudicate an ownership dispute. The court erred, however, in concluding that the same immunized artwork permits adjudication of the same ownership dispute as long as it proceeds under the rubric of in personam jurisdiction. When Congress enacted the FSIA in 1976, it created a statutory procedure for making service on and obtaining in personam jurisdiction over foreign states. Those FSIA provisions did not nullify the assurances to foreign lenders that Congress had deemed necessary in enacting § 2459 by making those lenders' artwork the basis for jurisdiction regardless of State Department § 2459 determinations. The district court erred in interpreting the later enactment to vitiate the earlier grant of immunity.

It is particularly anomalous to infer such a result from the FSIA's exception for property "present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3). Section 2459 instructs the courts to treat certified exhibits as if they are not present in the United States for jurisdictional purposes, and there is no reason to treat them differently for purposes of 28 U.S.C. § 1605(a)(3) when doing so would frustrate the operation of the earlier statute. Moreover, under the FSIA, it is necessary to conclude not only that property is "present" in the United States in connection with a commercial activity, but

that the commercial activity has "substantial contact" with the United States. 28 U.S.C. § 1603(e). When artwork has been immunized - placed out of bounds for jurisdictional purposes - under § 2459, a court should not conclude that the requirements of the FSIA have been met.

ARGUMENT

A. Congress Enacted 22 U.S.C. § 2459 To Ensure That Artworks Falling Within Its Scope Would Not Be The Basis For Jurisdiction Against Foreign Lenders.

Congress enacted 22 U.S.C. § 2459 in 1965 to facilitate cultural exchanges with foreign nations. The statute authorizes the State Department (as the President's designee) to determine that objects to be displayed are "of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest." If a notice to that effect is published prior to importation of the objects, United States courts are prohibited from "issu[ing] or enforc[ing] any judicial process, or enter[ing] any judgment, decree, or order, for the purpose or having the effect of depriving [the sponsoring institution], or any carrier engaged in transporting such work or object within the United States, of custody or control of such object." Id.

Congress thus sought to assure foreign lenders that exhibiting their artwork would not provide a basis of jurisdiction in the United States. As the Senate Report accompanying the legislation observed, the statute was intended "to encourage the exhibition in the United States of objects of

cultural significance which, in the absence of assurances such as are contained in the legislation, would not be made available." S. Rep. No. 89-747, at 3 (1965); see also H.R. Rep. 89-1070, at 2-3 (1965), reprinted in 1965 U.S.C.C.A.N. 3576, 3577. The particular concern over protection of sovereign lenders is reflected by an exchange pending at the time of its enactment between a Soviet museum and the University of Richmond, through which the Virginia gallery sought to import several artworks. As a condition to the loan, the Soviet Union insisted on a grant of immunity from seizure as protection against suits by former Soviet citizens in the United States who had claims to the title of the artworks. Rodney M. Zerbe, Immunity from Seizure for Artworks on Loan to United States Museums, 6 Nw. J. Int'l L. & Bus. 1121, 1124 n.21 (1985).

As Representative Rogers explained, the bill was designed to assure the foreign lender that it could lend artwork to the United States without incurring the risk that the artwork would be seized or the lender would become subject to suit:

> If a foreign country or an agency should send exhibits to this country in the exchange and cultural program and someone should decide that is necessary for them to institute a lawsuit against that particular country or those who may own the cultural objects, the bill would assure the country that if they send the objects to us, they would not be subjected to a suit and an attachment in this country.

111 Cong. Rec. 25,929 (1965) (remarks of Rep. Rogers) (emphasis added).

Although the statute refers to process that would deprive the receiving institution "of custody or control" of the artwork, its purpose was not to preclude assertion of jurisdiction against an American museum, which would, in any event, be subject to in personam jurisdiction. Congress' explicit aim, instead, was to ensure that foreign lenders would not be subject to jurisdiction when they loaned immunized artwork for temporary exhibits in the United States that the Executive Branch determined to be culturally significant and in the national interest.

When Congress enacted § 2459 in 1965, the primary jurisdictional concern as to sovereigns was the exercise of in rem and quasi in rem jurisdiction over artwork to resolve claims as to its ownership, because in personam jurisdiction over foreign states was generally not at issue. At the time of the statute's enactment, "jurisdiction was based routinely on attachment of assets of the foreign state located within the territorial reach of the court." See Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations, at 208 (2d ed. 2003). Legal process directed at the property in the United States was necessary to obtain jurisdiction. There was no effective means to obtain jurisdiction over foreign sovereigns directly in light of the immunity from service of process enjoyed by foreign diplomats and consuls. See Hellenic Lines, Ltd. v. Moore, 345 F.2d 978, 979, 980-81 (D.C. Cir. 1965) (Ambassador of Tunisia's diplomatic immunity would have been violated by any compulsory service of process on him in a suit naming Tunisia as a defendant); id. at 984 n.7 (Washington, J., concurring) (noting

that, "[s]o far as I am advised," jurisdiction over a foreign sovereign had never been established except where the sovereign's property was in the U.S. or the sovereign had waived immunity; citing cases).

In 1965, foreign governments considering loans of state-owned art could not rely with certainty on sovereign immunity defenses if they entrusted custody of the artwork to others in the United States, given ambiguities in the law regarding sovereign and commercial activity and in rem jurisdiction. Under the "restrictive" theory of foreign sovereign immunity to which the United States then adhered, the State Department would generally recommend that foreign states be granted immunity for their sovereign or public acts, but would not recommend a grant of immunity for their commercial acts. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486-87 (1983). Immunity defenses might thus provide little assurance to lenders considering the loan of culturally significant artwork. Nor could a foreign government rely with confidence on the "Act of State" doctrine, particularly after that doctrine was significantly narrowed by the Second Hickenlooper Amendment to the Foreign Assistance Act of 1964.[3] The enactment of § 2459

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[3] The Act of State doctrine generally "'precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.'" Nemariam v. Federal Democratic Republic of Ethiopia, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007) (citation omitted). The 1964 legislation specified, however, that the doctrine does not bar a federal court from reaching the merits of a claim that a foreign sovereign confiscated property in violation of international law. See 22 U.S.C. § 2370(e)(2); see (continued...)

addressed this uncertainty by providing foreign lenders with the assurance that the temporary loan of artwork under the terms of the statute would not subject them to litigation.

B. The Temporary Exhibit Immunized Under Section 2459 Did Not Provide The Basis For In Rem, Quasi In Rem Or In Personam Jurisdiction.

The 14 paintings at issue in this suit came to the United States with the statutory immunity that Congress deemed essential to facilitate cultural exchanges among nations. The exhibitions were arranged under the terms of the Mutual Educational and Cultural Exchange Program administered by the State Department. The City of Amsterdam requested that the artwork be granted immunity from legal process. Although counsel for the Malewicz heirs filed an objection (see App. 688-93), the State Department determined that the objects were of cultural significance and that their temporary exhibition was in the national interest. See 68 Fed. Reg. 17,852 (April 11, 2003).

That determination should have ensured that the temporary exhibition in the United States would not be the basis of jurisdiction by the courts of the United States to adjudicate the ownership of the artworks.

1. Notwithstanding the State Department's § 2459 determination, plaintiffs filed suit during the pendency of the temporary exhibit and sought, among other relief, "an order directing defendant to return to the Malevich Heirs the Malevich

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[3](...continued)
also Peterson v. Royal Kingdom of Saudi Arabia 416 F.3d 83, 88 n.2 (D.C. Cir. 2005).

Works, currently present in the United States" and on exhibit at the Menil Collection in Houston. App. 54 (Am. Compl., Prayer for Relief, ¶ 1); see also App. 55 (id., ¶¶ 2, 4, 5).

The suit thus fell squarely within the scope of § 2459, which expressly precludes judicial process "for the purpose or having the effect of depriving" the U.S. custodians of the immunized artwork. That the deprivation of custody would be effected by an order directed at the borrower or transporter rather than at the artwork itself did not take the suit outside the terms or purpose of the statute. The district court's initial summons, issued on January 9, 2004, likewise constituted "judicial process" for the purposes of depriving an institution of control or custody. 22 U.S.C. § 2459(a).[4]

An order requiring return of the artwork would plainly be barred by the statute and that bar cannot be circumvented by artful pleading or an order declaring plaintiffs' to be the owners of the art and leaving its enforcement for a subsequent action. It is also no answer that the complaint also seeks alternative forms of relief including monetary damages. The assurances provided by the statute cannot properly be made to turn on whether plaintiffs resolve their ownership claim by

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[4] Black's Law Dictionary defines "process" as "1. The proceedings in any action or prosecution <due process of law>. 2. A summons or writ, esp. to appear or respond in court <service of process>. -- Also termed *judicial process; legal process*." Black's Law Dictionary, 8th ed. (2004) (underscoring added). Thus, issuance of a summons is plainly issuance of "judicial process" within the maning of § 2459. Cf. Mazurek v. United States, 271 F.3d 226, 231 (5th Cir. 2001) ("An abuse of the judicial process occurs when a summons is sought for an 'improper purpose * * *'.").

monetary relief or by obtaining the paintings. See generally S. Rep. No. 89-747, at 3 (1965); H.R. Rep. 89-1070, at 2-3 (1965), reprinted in 1965 U.S.C.C.A.N. 3576, 3577. Moreover, any prayer for relief cannot sensibly be divorced from plaintiffs' attempt to obtain the paintings over which they claim ownership.

2. Plaintiffs likewise err in urging a reading of the FSIA that would frustrate the purpose of § 2459. Contrary to their assumption, such a reading is not required by the language of § 1605(a)(3) and runs afoul of basic canons of construction. Under familiar principles, courts should not read a statute in a manner that would undermine the purpose of another statute if other plausible constructions are available. See, e.g., Digital Equipment Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994) ("when possible, courts should construe statutes * * * to foster harmony with other statutory and constitutional law"); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective"); see also Edmond v. United States, 520 U.S. 651, 657 (1997) ("Ordinarily, where a specific provision conflicts with a general one, the specific governs.").

As discussed, prior to the enactment of the FSIA, attachment of property in the United States provided the only practical means of establishing jurisdiction over a foreign state. The FSIA for the first time made "unnecessary the practice of seizing and attaching the property of a foreign government for the purpose of obtaining jurisdiction" by providing "a statutory

procedure for making service upon, and obtaining in personam jurisdiction over, a foreign state." See H.R. Rep. 94-1487, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606. As relevant here, the statute provides jurisdiction for cases "in which rights in property taken in violation of international law are in issue and that property * * * is present in the United States in connection with a commercial activity carried on in the United States by the foreign state." 28 U.S.C. § 1605(a)(3).

In removing the need to attach the property in dispute, Congress did not inadvertently vitiate the assurances it had deemed necessary when it enacted § 2459. Section 2459, in effect, instructed the courts to treat covered artwork as if it were not "present" in the United States for purposes of establishing in rem or quasi in rem jurisdiction. Contrary to the district court's apparent assumption, there is no indication that in enacting the FSIA, Congress meant to have courts resolve the same issues of ownership by permitting the same artwork to be treated as "present" in the United States for purposes of in personam jurisdiction.[5]

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[5] The report of the House Judiciary Committee in support of the FSIA indicates that the statute "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states" and is "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities." H.R. Rep. No. 94-1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610. This legislative history does not suggest that the FSIA was intended to nullify 22 U.S.C. § 2459, which immunizes certain artwork from judicial process and does not establish foreign sovereign immunity.

Moreover, § 1605(a)(3) requires not only that the artwork be "present" in the United States but that it be present in connection with "commercial activity carried on in the United States by the foreign state," a term of art defined to mean "commercial activity carried on by such state and having substantial contact with the United States." 28 U.S.C. § 1603(e)(emphasis added). Congress generally intended the FSIA's nexus requirements to embody "[t]he requirements of minimum jurisdictional contacts and adequate notice," citing International Shoe Co. v. Washington, 326 U.S. 310 (1945), and McGee v. International Life Ins. Co., 355 U.S. 220, 223 (1957). H.R. Rep. No. 94-1487, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6612. Under those fundamental principles, a court does not exercise personal jurisdiction over a defendant unless that defendant has "sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice." International Shoe, 326 U.S. at 320. Indeed, this Court has held that the FSIA's "substantial contact requirement is stricter than that suggested by a minimum contacts due process inquiry." Zedan v. Kingdom of Saudi Arabia, 849 F.2d 1511, 1513 (D.C. Cir. 1988). It is not consistent with notions of fair play and substantial justice to assure a foreign sovereign that artwork is not subject to jurisdiction in the United States by providing protection under § 2459 and then to assert in personam jurisdiction over the sovereign for a claim based on that artwork.

There is no indication that Congress believed that loaning artwork for a temporary exhibit protected from judicial process under § 2459 would constitute the type of "substantial contact" with the United States necessary to establish jurisdiction under 28 U.S.C. § 1603(e) and § 1605(a)(3). The purpose of § 2459 was to reassure foreign lenders - to shape their expectations concerning suits and seizures of artwork temporarily loaned to the United States. There is no basis to believe that Congress intended the loan of immunized artwork to constitute a "substantial contact" under § 1603(e) and § 1605(a)(3) of the FSIA, without regard to the assurances provided to foreign sovereigns under § 2459 and the reasonable expectations shaped by those assurances.[6]

To adopt plaintiffs' interpretation, it would thus be necessary to conclude not only that the immunized artwork is "present" in the United States for purposes of 28 U.S.C. § 1605(a)(3), but also that Congress would have intended that exhibits protected under § 2459 be deemed to constitute "substantial contact" that would permit suit as to the artwork's

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[6] Contrary to the district court's assertion (App. 141), Republic of Austria v. Altmann, 541 U.S. 677 (2004) did not reject consideration of fair notice principles in this context. Altmann involved only the question whether the FSIA would be applied to conduct pre-dating its enactment, not whether the FSIA requires a sufficient nexus with the United States to render foreseeable the sovereign's susceptibility to suit in a U.S. court. See 541 U.S. at 696-98.

ownership. Because there is no basis for either conclusion, plaintiffs' interpretation of § 1605(a)(3) must be rejected.[7]

Finally, even if the district court's reading were not so directly at odds with the structure of the immunity statutes and clear congressional intent, its reasoning would depart from the many decisions that have recognized that not all contacts with a forum confer jurisdiction and have avoided construing contact with the United States in a manner that might unduly infringe on foreign sovereign immunity. See Fandel v. Arabian American Oil Co., 345 F.2d 87, 88-89 (D.C. Cir. 1965) (foreign oil company was not "doing business" in Washington, D.C. within the meaning of D.C.'s long-arm statute when it operated a six-person office to interact with federal agencies and others; conduct was carried out in the District of Columbia by virtue of the city's unique status as the center of the federal government, and "the purpose of Congress was not to make that [type of] presence in every case a basis for assertion of personal jurisdiction"); see also Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51-52 (2d Cir. 1991) (refusing to exercise jurisdiction based on organization's

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[7] We take no position as to whether the exhibit at issue would properly be regarded as "commercial" under § 1605(a)(3), and, in our view, the Court should not reach that question. It should be noted, however, that under the district court's reasoning, the FSIA's limitation to "commercial" activity would have virtually no independent impact on the immunity analysis as applied to artwork. The district court's opinion strongly suggests that it would be at best extremely difficult to structure cultural exchanges in a way that would render them not "commercial" as the term is used in the FSIA. An otherwise non-commercial art loan should not be brought within the scope of the FSIA exception, for instance, merely because a foreign government sends personnel to this country to accompany the artwork and secure its safety.

participation in United Nations-related activities on the ground that basing jurisdiction on that conduct "would put an undue burden on the ability of foreign organizations to participate in the UN's affairs"). Even with respect to domestic entities, the courts have recognized that not all contacts "count" in an analysis of personal jurisdiction. See, e.g., Zeneca Ltd. v. Mylan Pharms., Inc., 173 F.3d 829, 831 (Fed. Cir. 1999) (domestic company's conduct in "petitioning the national government does not 'count' as a jurisdictional contact in the personal jurisdiction analysis"); AGS Int'l Servs. S.A. v. Newmont USA Ltd., 346 F. Supp. 2d 64, 75-76 (D.D.C. 2004)(U.S. corporation's office operations in the District of Columbia did "not amount to the kind of presence intended to fall within the scope" of the D.C. long-arm statute, where operations in D.C. were "solely for the purpose of maintaining relationships with the United States government and foreign embassies"); see also Nartex Consulting v. Watt, 722 F.2d 779, 786-87 (D.C. Cir. 1983) (noting open question as to whether the "government contacts" exception to personal jurisdiction was limited to activities protected by the First Amendment).

The statutory analysis adopted in Shaffer v. Singh, 343 F.2d 324, 326-27 (D.C. Cir. 1965), is instructive. The Shaffer Court held that a foreign national who was subject to diplomatic immunity at the time an accident occurred was not subject to the D.C. long-arm statute even after surrendering his post and leaving the jurisdiction. The Court harmonized the long-arm statute with its understanding of principles of diplomatic

immunity by construing the term "nonresident," as used in the statute more narrowly than its "literal meaning" required, as excluding individuals who could not have been validly served, at the time of the accident, in the District of Columbia. Ibid.

In sum, the district court's ruling unnecessarily reads a 1976 exception to foreign sovereign immunity to undermine a specific grant of immunity for loaned artwork enacted in 1965. That interpretation is not mandated by the language or history of the FSIA and it frustrates an important means of facilitating cultural exchanges.

C. Undermining The Assurances Congress Sought To Provide Under Section 2459 Will Significantly Undermine The Statutory Goal Of Fostering Cultural Exchanges.

It is unclear whether the district court recognized the full extent to which its ruling would frustrate Congress's intent "to encourage the exhibition in the United States of objects of cultural significance which, in the absence of assurances such as are contained in the legislation, would not be made available." S. Rep. No. 89-747, at 3 (1965).

The United States Information Agency and Department of State have published immunity notices under § 2459 for more than 1200 exhibits since 1981, and more than half of these have been published since 2000.[8] The exhibitions have included cultural objects from all parts of the world and have been displayed at museums throughout the country. The last ten notices, for

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[8] These figures are approximate and are derived from a search of the Westlaw Federal Register database.

example, have addressed cultural objects to be displayed at 11 different museums in 11 different cities.[9] The broad range of exhibits authorized under the auspices of § 2459 has included vastly popular shows such as the "King Tut" exhibition in the 1970s, and the Vermeer exhibit at the National Gallery of Art in 1995-96. See 41 Fed. Reg. 37609 (Sept. 7, 1976) (Tutankhamun Collection, Egypt); 60 Fed. Reg. 48201 (Sept. 18, 1995) (Johannes Vermeer).

As Congress intended, the statute has "contribut[ed] to the educational and cultural development of the people of the United States," by providing assurances to foreign lenders so that the American public would have the opportunity to see exhibits that otherwise would not be available. S. Rep. No. 89-747, at 2

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[9] See 72 Fed. Reg. 74401 (Dec. 31, 2007) ("The Lure of the East: British Orientalist Painting, 1830-1925," Yale Center for British Art, New Haven, CT); 73 Fed. Reg. 220 (Jan. 2, 2008) ("Afghanistan: Hidden Treasures From The National Museum, Kabul," National Gallery of Art, Washington, DC, Asian Art Museum of San Francisco, CA, Museum of Fine Arts, Houston, TX, and the Metropolitan Museum of Art, New York, NY); 73 Fed. Reg. 220 (Jan. 2, 2008) ("Gustave Courbet," Metropolitan Museum of Art, New York, NY); 73 Fed. Reg. 221 (Jan. 2, 2008) ("In the Forest of Fontainebleau: Painters and Photographers From Corot To Monet," National Gallery of Art, Washington, DC and Museum of Fine Arts, Houston, TX); 73 Fed. Reg. 534 (Jan. 3, 2008) ("Ancient Greek Objects: 'The Krimisa Apollo' and 'Bronze Hydria,'" Princeton University Art Museum, Princeton, NJ); 73 Fed. Reg. 1258 (Jan. 7, 2008) ("Assorted Objects of Greek and Roman Art," Metropolitan Museum of Art, New York, NY); 73 Fed. Reg. 1258 (Jan. 7, 2008) ("Luxury for Export: Artistic Exchange Between India and Portugal Around 1600," Isabella Stewart Gardner Museum, Boston, MA); 73 Fed. Reg. 2300 (Jan. 14, 2008) ("Rembrandt: Three Faces of the Master," Cincinnati Art Museum); 73 Fed. Reg. 2301 (Jan. 14, 2008) ("Vatican Splendors," Florida International Museum, St. Petersburg, FL, the Western Reserve Historical Society, Cleveland, OH, and the Minnesota Historical Society, St. Paul, MN); 73 Fed. Reg. 2562 (Jan. 15, 2008) ("Portrait of a Man," Metropolitan Museum of Art, New York, NY).

(1965). The statute has likewise promoted its other "salutary" purpose of providing "'a significant step in international cooperation.'" S. Rep. No. 89-747, at 1-2. The § 2459 program advances important national interests, including public diplomacy initiatives of the United States government, outreach efforts of the American museum community, and avoidance of friction with foreign lenders, including foreign states and their political subdivisions.

The ongoing effectiveness of § 2459 depends upon the ability to provide assurance to foreign lenders that participating in an immunized exhibit will, in fact, protect the lenders and their artwork from litigation in the United States based on the exhibit. In this case, for example, the chief curator for the Stedelijk Museum Amsterdam averred that the museum would not have agreed to loan the artwork without the grant of § 2459 immunity. App. A-303. See also Sue Choi, Comment, The Legal Landscape of the International Art Market After Republic of Austria v. Altmann, 26 Nw. J. Int'l L. & Bus. 167, 183 (2005) ("The vast number of art institutions, private holders and individuals who lend works of art for nonprofit display, assert that a 'firm guarantee against judicial seizure is an "essential factor" in [their] decision to lend' artwork to foreign countries.").

The experience of the State Department and other Executive Branch agencies in administering § 2459 confirms the view of Congress in enacting the legislation that the assurances provided by the program are essential. As the figures cited above indicate, growing concerns over litigation risk have led to an

increased demand for State Department immunity determinations under § 2459. Similar concerns have prompted several other nations to adopt various statutes to protect lenders from subjecting themselves to litigation risk by making artwork available for exhibition.[10] The United Kingdom, for example, enacted such a statute in July 2007, explaining that the absence of a general immunity for loaned works made foreign lenders "increasingly reluctant to lend such exhibitions without a guarantee that their art treasures will be returned."[11]

The willingness of lenders to make their art available is threatened by the district court decision, and will be dramatically altered if this Court holds that foreign sovereigns submit to United States jurisdiction by sharing their artwork with the American public under the § 2459 program. Such a holding threatens to undermine the interests that § 2459 was designed to foster and to create tension in United States relations with other countries that the § 2459 program was meant to facilitate. This view constitutes "the considered judgment of the Executive on a particular question of foreign policy." Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004).

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[10] Statutory citations are included as an addendum. The text of many of these statutes (including some translations) is provided in Matthias Weller, Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the Lichtenstein Litigation, 38 Vand. J. Transnat'l L. 997, 1025-1039 (2005).

[11] Explanatory Notes to Tribunals, Courts and Enforcement Act of 2007, ¶ 614 (available at http://www.opsi.gov.uk/acts/acts2007/en/07en15-j.htm. See Tribunals, Courts and Enforcement Act, 2007 (c. 15), pt. 6, §§ 134-138 (protection of cultural objects on loan), royal assent July 19, 2007 (U.K.).

CONCLUSION

For the foregoing reasons, the orders of the district court should be reversed.

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JANUARY 2008

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I hereby certify that the foregoing brief complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B). The word processing program used to prepare the brief reports that the brief is 6894 words long.

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2008, I transmitted an original and fourteen copies of the foregoing Brief For the United States as Amicus Curiae in Support of Appellant to the Clerk of the United States Court of Appeals for the District of Columbia Circuit, by causing the briefs to be sent by hand delivery to the Court.

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STATUTORY ADDENDUM

CONTENTS

22 U.S.C. § 2459 provides:

§ 2459. Immunity from seizure under judicial process of cultural objects imported for temporary exhibition or display

(a) Agreements; Presidential determination; publication in Federal Register

Whenever any work of art or other object of cultural significance is imported into the United States from any foreign country, pursuant to an agreement entered into between the foreign owner or custodian thereof and the United States or one or more cultural or educational institutions within the United States providing for the temporary exhibition or display thereof within the United States at any cultural exhibition, assembly, activity, or festival administered, operated, or sponsored, without profit, by any such cultural or educational institution, no court of the United States, any State, the District of Columbia, or any territory or possession of the United States may issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving such institution, or any carrier engaged in transporting such work or object within the United States, of custody or control of such object if before the importation of such object the President or his designee has determined that such object is of cultural significance and that the temporary exhibition or display thereof within the United States is in the national interest, and a notice to that effect has been published in the Federal Register.

(b) Intervention of United States attorney in pending judicial proceedings

If in any judicial proceeding in any such court any such process, judgment, decree, or order is sought, issued, or entered, the United States attorney for the judicial district within which such proceeding is pending shall be entitled as of right to intervene as a party to that proceeding, and upon request made by either the institution adversely affected, or upon direction by the Attorney General if the United States is adversely affected, shall apply to such court for the denial, quashing, or vacating thereof.

(c) Enforcement of agreements and obligations of carriers under transportation contracts

Nothing contained in this section shall preclude (1) any judicial action for or in aid of the enforcement of the terms of any such agreement or the enforcement of the obligation of any carrier under any contract for the transportation of any such object of cultural significance; or (2) the institution or prosecution by or on behalf of any such institution or the United States of any

action for or in aid of the fulfillment of any obligation assumed by such institution or the United States pursuant to any such agreement.

28 U.S.C. § 1603 provides in relevant part:

For purposes of this chapter -

* * * * *

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604 provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605(a)(3) provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

* * * * *

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]

Citations to Foreign Statutes Containing Various Legal Protections for Loaned Artworks[1]

Tribunals, Courts and Enforcement Act, 2007 (c. 15), pt. 6, §§ 134-138 (protection of cultural objects on loan), royal assent July 19, 2007 (U.K.) (available at http://www.england-legislation.hmso.gov.uk/acts/acts2007/ukpga_20070015_en_1)

Loan Of Cultural Properties (Jurisdiction Restriction) Law, 5767-2007 (Feb. 21, 2007) (Israel) (unofficial translation, available at(http://www.jl-lawfirm.com/files/pdfs/laws/English-Translation-of-the-Anti-Seizure-Law-En.pdf)

Loi modifiant le Code judiciaire en vue d'instituer une immunite d'execution a l'egard des biens culturels etrangers exposes publiquement en Belgique, Moniteur Belgique no. 233 of June 29, 2004, at 52719 (Belgium)

Federal Act on the International Transfer of Cultural Property (Cultural Property Transfer Act, CPTA), June 20, 2003 (Switzerland)

Foreign Cultural Property Immunity Act, R.S.A. 2000, c.F-17, s.2 (2006) (Alberta, Can.)

Gesetz zum Schutz deutschen Kulturgutes gegen Abwanderung, Oct. 21, 1998, BGBI I at 2, 70 (F.R.G.) (Germany)

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 55 (2006) (British Columbia, Can.)

Law No. 94-679 of August 8 1994, Art. 61, Journal Official de la Republique Francaise, Aug. 10, 1994, p. 11668 (France)

National Monuments (Amendment) Act (Act No. 17/1994 (Ireland)

Foreign Cultural Objects Immunity From Seizure Act, R.S.O. 1990, c. F.23, s.1 (2006) (Ontario, Can.)

Code of Civil Procedure S.Q., ch. 48, art. 553.1 (Quebec, Can.).

The Foreign Cultural Objects Immunity From Seizure Act, R.S.M. 1987, c. F140 (2006) (Manitoba, Can.)

Protection of Movable Cultural Heritage Act, 1986, Act. No. 11 § 14(3) (Australia).

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[1] The text of many of these statutes (including some translations) are set forth in Matthias Weller, Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in Light of the Lichtenstein Litigation, 38 Vand. J. Transnat'l L. 997, 1025-1039 (2005).